(25,632)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 802.

THE GOLDFIELD CONSOLIDATED MINES COMPANY

vs.

JOSEPH J. SCOTT, AS COLLECTOR OF U. S. INTERNAL REVENUE, FOURTH CALIFORNIA DISTRICT.

ON A CERTIFICATE TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 12, 1917.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2777.

THE GOLDFIELD CONSOLIDATED MINES COMPANY, a Corporation, Plaintiff in Error,

vs.

JOSEPH J. SCOTT, as Collector of U. S. Internal Revenue, Fourth California District, Defendant in Error.

Upon Writ of Error to the United States District Court for the Northern District of California, Second Division.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States under Section 239, *Judicial Code.*

2 Names and Addresses of Solicitors upon this Writ of Error.

For Plaintiff in Error:

Henry M. Hoyt, Reno, Nevada.
L. A. Gibbons, Reno, Nevada.
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For Defendant in Error:

Thomas W. Gregory, Attorney General, Washington, D. C.
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M. A. Thomas, Ass't U. S. Attorney, San Francisco, Cal.

3 In the United States Circuit Court of Appeals for the Ninth Circuit.

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Before Gilbert, Morrow, and Hunt, Circuit Judges.

This cause came to the Circuit Court of Appeals for the Ninth Circuit upon a writ of error to the United States District Court for the Northern District of California, Second Division, such writ of error having been sued out upon error assigned to the sustaining of a general demurrer to the complaint of the plaintiff in error, and to an order and judgment of dismissal of the said action.

4 There were two causes of action in the complaint, and the demurrer was a general demurrer to the whole complaint and to each cause of action therein. A statement of the allegations of the complaint as to the first cause of action, and omitting formal and unnecessary matter, is as follows:

The plaintiff below, and plaintiff in error herein, The Goldfield Consolidated Mines Company, is and was a corporation engaged in mining in the State of Nevada, which State is within the jurisdiction of the Fourth Internal Revenue District of California.

An assessment of an excise tax under section 38 of the Act of Congress approved August 5th, 1909, entitled: "An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for other purposes," was levied upon the plaintiff in error by the then Collector of Internal Revenue for the said District, amounting to $41,890.91, upon an assessment of $4,189,091.61, which tax was paid under protest of the levy and assessment. The plaintiff in error had made a return of annual net income for that year, 1909, claiming a deduction for the value of the ore in the ground before it was mined, of 230,463 tons of ore, of the value in the ground before it was mined, of $5,646,940.46, upon the ground that such ore constituted exhaustion of the capital value of the property owned by it, and its protest against the assessment and levy was based thereon. Thereafter, the plaintiff in error made application

for refund of said tax pursuant to sections 3220 and 3226 of the Revised Statutes, and based its claim to such refund upon the propriety of the deduction so claimed, and stated in said application that such exhaustion of capital assets constituted a depreciation within
5 the meaning of the Act in question, and that the same would have more than offset the total net income of the plaintiff in error.

Thereafter, during the pendency before the Commissioner of Internal Revenue of said application for refund, the plaintiff in error, by its duly authorized officials, made full explanation before the Commissioner of Internal Revenue, and offered full proof of the correctness in all respects of its said return of annual net income for the year 1909 and of all statements of fact contained therein, and while the Commissioner of Internal Revenue was holding said application under consideration, the plaintiff in error was duly and regularly granted by said Commissioner, leave to comply fully with the then rules and regulations of the Treasury Department embodied in Treasury Decision 1675 promulgated February 14th, 1911, and particularly sections 80 to 89 thereof relating to depreciation of property of corporations whose business involved wasting assets, and like leave was so given to present to the Commissioner of Internal Revenue, an amended statement and return of annual net income for said year with explanations of fact in support thereof, and to ascertain the unit cost per ton of the estimated ore bodies belonging to the plaintiff in its various mining properties as of January 1st 1909, and the estimated value of the ore in the ground before it was mined for the year 1909, by multiplying the said unit cost per ton by the total number of tons mined in said year, all of which was done, and the same was filed by the plaintiff in error during the time so provided. The rules and regulations so referred to are as follows:

6 80. In case of corporations whose business consists in part or wholly of mining, producing, and disposing of deposits of nature, (ores, coals, gas, petroleum, and sundry minerals) the conduct of such business will be understood to comprehend two classes of gains or losses, viz:

(*a*) The gain or loss resulting from the sale of capital assets, i. e., either the increment, or the loss, arising through possessing over a period of time the investment in the same.

(*b*) The trading or commercial gain attached to the conduct of the industry, the employment of working capital, the effort and risk involved.

81. In the ascertainment of net income deduction will be allowed for depreciation arising from exhaustion of deposits of ore, mineral, etc., and for depreciation and obsolescence of improvements, in accordance with general regulations respecting depreciation allowance, on the basis of the original capital investment cost of the properties concerned to the company reporting.

82. A further deduction will also be allowed, through not including the same at all in the item of gross income (item 3, Form 637), for the unearned increment represented in such properties as at January 1, 1909, which will be determined in general as follows:

83. An estimate should be made as of January 1, 1909, of the fair market value at that date of the minerals, etc. in deposit. This estimant should be formed on the basis of the disposal value of the minerals in total and exclusive of value of improvements and development work. This valuation should also be reduced to a unit value—per ton, barrel, etc.

7 NOTE.—Values as aforesaid should not be estimated on the basis of the assumed salable value of the output under current operative conditions, less the actual cost of production, because as hereinbefore stated, the selling price under such conditions comprehends a profit both for carrying the investment in minerals, improvements, and working capital, and for conducting operations in respect of production and disposal of product. The value to be determined as stated must be on the basis of the salable value of the entire deposit of the aggregate units of minerals considered en bloc if disposed of in that form. Nor must such valuation comprehend any speculative value which might attach to a sale of the minerals en bloc, i. e., a value which might be obtained on the ground that the future would develop a much greater reserve of mineral deposits than were believed to exist at the time estimate as of January 1, 1909, was formed. Any value of this latter character would attach obviously to such additional reserves when developed in future.

84. The unit value as of January 1, 1909, ascertained as above outlined, would indicate the value to be attached at that date to the capital assets disposed of during any calendar year succeeding, and should be used in determining the unearned increment at January 1, 1909, which may be excluded entirely from the item of gross income, as before explained, in following manner, viz:

Value at January 1, 1909, determined in manner outlined, of minerals, etc., which may be removed and disposed of in any year subsequent thereto.............................. $..

Less the following:

(a) Proportion of depreciation charge applying to exhaustion of minerals disposed of, ascertained as first explained herein on basis of original cost.......................... $..
(b) Royalty paid, if any, on minerals disposed of........... ..
Balance, being unearned increment at January 1, 1909, to be excluded from gross income item........................ ..

85. The precise detailed manner in which the estimate of value of minerals, etc., as at January 1, 1909, shall be formed, must naturally be determined upon by each corporation interested, but formal record of such estimates, together with all sustaining information, should be carefully filed so as to be readily accessible for reference.

8 Values as stated, as determined at January 1, 1909, should be used in compilation in all subsequent years' excise-tax returns. The question as to whether it subsequently develops the property possessed a greater quantity of mineral, etc., reserve than was in the aggregate estimated as of January 1, 1909, is immaterial. Any excess

which may be developed will be considered as possessing the same value at January 1, 1909, as that which then may have been known to be in the property.

86. Each excise-tax return (Form 637) should be accompanied with memorandum setting forth the extent in amount of the exclusion made from the item gross income for unearned increment realized during the year, as above outlined.

87. As the amount to be deducted for depreciation (paragraph 2 preceding) is to be formed on basis of the estimated reserve of minerals, etc., it follows that if it develops such estimate is understated, the cost investment in the capital asset may be wholly extinguished before all mineral reserves are removed. When this is reached, further deductions for exhaustion of minerals should be discontinued but in such event, it will be noted, the allowance for unearned increment which is to be excluded entirely from gross income will be correspondingly increased.

88. In case of corporations leasing mines and paying royalties on minerals, etc., removed, the royalties paid are to be treated as expenses and deducted in ascertaining net income, as provided in general regulations. Any leasehold investment which the operating corporation may have in such properties, either through a payment originally made for acquirement thereof or for improvements made upon the property, to be accounted for in accordance with regu-
9 lations governing depreciation allowances and disposition of capital assets.

89. In respect to properties of the character in question which may be acquired by a corporation after January 1, 1909, a deduction will be allowed only as to depreciation arising from exhaustion based on original cost; no exclusion from gross income can be made for unearned increment, as profit arising in sale of such capital assets applies wholly to the period subsequent to January 1, 1909.

In addition to the rules and regulations as above set out, the plaintiff in error was further required by the Commissioner of Internal Revenue to make a calculation for the year 1909 and of previous years of operation, to ascertain the total exhaustion of ore which had taken place in the operation of its mining properties, and to enter such amount of tonnage exhaustion, multiplied by the unit cost per ton, in its official corporate books of account, and also cause the same to be included in its printed annual report of that current year to its stockholders and the public with appropriate explanation thereof, all of which requirements were performed by the plaintiff in error in obedience to said orders of the Commissioner of Internal Revenue, and within the time granted therefor.

The complaint alleged that the resulting figures so rendered in said return were and are in all respects true and correct, and resulted in a showing of net income measuring the excise tax under the rules and regulations amounting to $765,380.02 upon which the tax would have been $7,653.80; it also appeared from said com-
10 plaint that this compliance with the requirements of the Commissioner of Internal Revenue was made by the plaintiff

in error without waiving its claim to the full deduction originally claimed.

It further appears from the complaint, that in disobedience and disregard of the law and of the rules and regulations of the Treasury Department, the Commissioner of Internal Revenue disallowed the application for refund of the plaintiff in error in toto, which disallowance was communicated to the plaintiff in error December 29th, 1913 by the defendant in error, Collector of Internal Revenue, the then collector having succeeded to the office of the Collector of Internal Revenue who had originally levied the tax in question. The complaint alleges that no part of the said tax has been refunded or paid back, and that the same is still due and unpaid.

The second cause of action is for a like tax levied for the year 1910 and is in all respects necessary for consideration herein of the same character as the first cause of action, and repetition is deemed unnecessary in presenting the facts necessary to enable the Court to pass upon the questions of law to be certified.

Questions of Law Concerning which the Circuit Court of Appeals Desires the Instruction of the Supreme Court.

1. Under the provisions of paragraph 38 of the Act of Congress entitled: "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5th 1909, (36 Statutes at Large, p. 11, at p. 112), is
11 a mining corporation, for the purpose of determining its net income for the basis of taxation, entitled to deduct from its gross income any amount whatever on account of depletion or exhaustion of ore bodies caused by its operations for the year for which the tax is assessed?

2. Is such a corporation under said Act, entitled in the ascertainment of its net income, to a deduction against gross proceeds from the mining and treatment of ores to the extent of the cost value of the ore in the ground before it was mined, ascertained in strict compliance with the rules and regulations of the Treasury Department of February 14th 1911 (Tr. Dec. 1675)?

3. Where such a corporation claimed originally in its return of net income under said Act a deduction for depreciation from exhaustion of ore for the year equal to the actual value of the ore in the ground before it was mined, and having been denied any deduction whatever for exhaustion of ore, and having been assessed accordingly and having paid the resulting tax, made application pursuant to sections 3220 and 3226 Revised Statutes for refund, during the pendency of which application said corporation was granted leave to amend and did amend its return of net income in strict accordance with the rules and regulations promulgated February 14th 1911, sections 80 to 89 T. D. 1675, resulting in an amended return based upon cost as provided in said regulations and showing claimed deductions therefrom less than the corporation's net realizations for the year

from the ore actually mined, is such corporation entitled to an allowance of deductions and refund of taxes accordingly?

12 4. In what, if any, way is the right to such claimed deductions affected by the fact that such corporation, in obedience to requirements imposed by the Commissioner of Internal Revenue at the time of filing its amended returns showing the cost value as of January 1st 1909 of the ores mined during the year, caused to be entered in its official books of account and printed in its annual report of that current year to all of its stockholders and to the public, a statement of the total amount of ore exhaustions, multiplied by the unit cost per ton on its mining properties for that and all previous years?

(Signed) WM. B. GILBERT,
WM. W. MORROW,
WILLIAM H. HUNT,
Judges U. S. Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, November 14th 1916.

[Endorsed:] Certificate of U. S. Circuit Court of Appeals, 9th Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239 Judicial Code. Filed Nov. 14, 1916. F. D. Monckton, Clerk.

13 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2777.

THE GOLDFIELD CONSOLIDATED MINES COMPANY, a Corporation, Plaintiff in Error,

vs.

JOSEPH J. SCOTT, as Collector of U. S. Internal Revenue, Fourth California District, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals for the Ninth Circuit to Copy of Certificate of said Court Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twelve (12) pages, numbered from and including one (1) to and including twelve (12) to be a full, true and correct copy of the Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239 of the Judicial Code (36 Stat. 1157), filed in the above-entitled cause on the fourteenth day of November, A. D. 1916, as the original thereof remains on file and appears of record in my office.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this fourteenth day of November, A. D. 1916.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

14 [Endorsed:] No. 2777. United States Circuit Court of Appeals for the Ninth Circuit. The Goldfield Consolidated Mines Company, a Corporation, Plaintiff in Error, vs. Joseph J. Scott, as Collector of Internal Revenue, etc., Defendant in Error. Certified Copy of Certificate of the United States Circuit Court of Appeals, 9th Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States under Section 239 Judicial Code.

Endorsed on cover: File No. 25,632. U. S. Circuit Court Appeals, 9th Circuit. Term No. 802. The Goldfield Consolidated Mines Company, vs. Joseph J. Scott, as collector of U. S. internal revenue, fourth California district. (Certificate.) Filed December 1st, 1916. File No. 25,632.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 802.

THE GOLDFIELD CONSOLIDATED MINES COMPANY v. JOSEPH J. SCOTT, as Collector of U. S. Internal Revenue, Fourth California District.	BRIEF OF THE GOLDFIELD CONSOLIDATED MINES CO.

STATEMENT OF FACTS.

In the certificate in this case, a rather full statement of facts is contained covering pages 2 to 6 inclusive, and here will be repeated only such condensation thereof as is deemed necessary for an intelligent consideration of the questions propounded by the Circuit Court of Appeals of the Ninth Circuit to this Court.

The questions arise upon an action brought by The Goldfield Consolidated Mines Company against Joseph J. Scott, as Collector of Internal Revenue for the recovery back of two

years taxes, paid under the Corporation Excise Tax of 1909. The mining company had originally claimed deduction for an amount in excess of its realized net proceeds from mining for the years 1909 and 1910, but claim for deduction was disallowed and the tax was assessed and levied and paid under protest, both of the assessment and levy. Thereafter, the mining company under Sections 3220 and 3226, Revised Statutes, duly made application for refund, and during the pendency of said application obtained leave to amend its returns of so called "income" for those two years strictly in compliance with the United States Treasury Department regulations, printed in part at pages 325 inclusive of the Certificates (Folios 6 to 9 inclusive). Thereafter the mining company was notified by the Collector of Internal Revenue that the application for refund was denied, whereupon this action was brought, there being two causes for action, one for taxes paid for the year 1909 and another for the taxes paid for the year 1910. The defendant demurred generally upon the ground that the complaint did not contain facts sufficient to constitute a cause of action as to either cause of action, which demurrer was sustained and a Writ of Error prosecuted therefrom and from the judgment pursuant

thereto, and when said Writ of Error was heard in the Circuit Court of Appeals, it resulted in a Certificate issuing containing the questions which are now before the Court.

POINTS AND AUTHORITIES.

This Court is already quite familiar with the matters here in controversy, as similar questions have already been before the Court. Since this action was commenced, this Court has rendered decisions in two cases, namely:

> Stratton's Independence Ltd v Howbert 231 U. S. 399 and
> von Baumbach v Sargent Land Company 246 U. S. 503.

We frankly concede that if this Honorable Court is strictly to adhere to the principles laid down in these two cases, they are conclusive against The Goldfield Consolidated Mines Company in this proceeding. In the former of those two cases it was held, among other things, that a mining company, notwithstanding depletion of its capital assets by its mining operations is nevertheless a corporation doing business within the meaning of the Corporation Excise Tax of 1909, that it's proceeds are income and that it is liable to the tax; in that case however, enough was con-

ceded to sustain our contention in this case, for the Court said, at page 417 "Congress no doubt contemplated that such corporations among others, were doing business with a wasting capital, and for such wastage they made due provision in declaring that from the gross income there should be deducted (inter alia' 'all losses actually sustained within the year including a reasonable allowance for the depreciation of property, if any.'"

We therefore felt after the rendering of this decision that we were still entitled to our legal remedy because, as seen by the certificate, The Goldfield Consolidated Mines Company had strictly complied with all the regulations of the Treasury Department, which had been so carefully devised in harmony with the idea expressed in the last quotation from the opinion of this Court in the Stratton's Independence Ltd case. The decision in that case seemed specifically to recognize what we had believed to be well established doctrine, that such part of proceeds of a business as represented depletion of it's capital was not in truth income, but should be deducted from the gross proceeds in order to ascertain the true income.

In a decision rendered in 1917, however, von Baumbach v Sargent Land Company, 242 U. S. 503, this Court has finally determined that

the words "depreciation of property" in the Act of Congress did not include the depletions of a mine. If this principle be adhered to, as well as the doctrine of Stratton's Independence Ltd, then we are, of course, without remedy.

Under these circumstances, all that we feel that we may with propriety maintain, is a plea that this important matter be given renewed consideration in the hope that a more satisfying result may be reached. We do not believe that Stratton's Independence Ltd would have been decided as it was, had it not been that the Court therein left adequate provision for the protection of a mining company in the assertion of proper deductions so as to leave untaxed that portion of it's proceeds which represent impairment of it's capital. A glance at the Treasury Department regulations, printed in the certificate, will disclose the fact that the Treasury Department fully recognized the justice of deducting from the so-called "gross income" such part as represented capital utterly destroyed, and it is to be presumed that in so framing the regulations, the Department believed that it was carrying out the intent of Congress. No doubt, in the administration of the Act by the Treasury Department, mining companies generally were

assessed and paid taxes according to these regulations for the years in question. It would therefore be manifestly unfair to The Goldfield Consolidated Mines Company if it should now receive exceptional treatment. It will be seen that the Treasury regulations, looked at from the standpoint of justice and equality, were at least fair to the government and, as we believe, a little less than fair to the mining companies. Every company engaged in mining was, by these regulations, required to pay a tax if it made a profit in any year even though in other years it made a loss; the regulations also clearly placed as the utmost limit of deductions upon the cost unit basis, the total ascertained cost of the mining property, and thus the mining companies ran the risk, even under the regulations, of paying taxes for one or more years and yet suffering a total loss instead of a total gain.

It has been held in many cases, heretofore regarded as authority, that "income" is not the same thing as receipts; that income is only such part of that which is received as leaves capital unimpaired. It is at least reasonable to assume that the Congress in enacting the law meant no more by the word "income" than has ordinarily been meant when that

word has been employed. The ore from a mine once excavated and treated is gone forever and capital assets are, to that extent, diminished. Only so much, therefore, of the proceeds of a mine operation can be regarded as income as remains after deducting therefrom the depletion or exhaustion of capital assets represented by the tons of ore so destroyed.

People v Davenport, 30 Hun. 177;
Mitchell v Doyle, 225 Fed. 437;
Southern Pacific Co., v Lowe, 238 Fed. 847;
Lynch v Hornby, 236 Fed. 661;
United States v Nippissing Mines Co., 202 Fed. 803.

In view of the fact that this honorable Court has committed itself to doctrines upon this subject in opposition to the views herein expressed, we feel that we cannot with propriety indulge in extended argument upon the point. We do feel, however, that The Goldfield Consolidated Mines Company, having shaped its course in strict compliance with the regulations of the U. S. Treasury Department, should not suffer the loss of the large sums paid for those years, in the absence of a compelling reason driving the Court to such a conclusion. The company had a right to assume

that the Treasury Department regulations were a "correct" application of the law.

> U. S. v Cerecedo Hermanos, 209 U. S. 338;
> Jacobs v Prichard, 223 U. S. 200;
> U. S. v Hammers, 221 U. S. 220.

The regulations were, upon their face, fair and equitable and indeed have been practically adopted by Congress in it's later legislation; settlements between the U. S. Treasury and the mining companies throughout the country were certainly almost universally made upon the basis of those regulations and in obedience thereto. It would seem better to harmonize the law upon this important subject if this Court would, at this time, so far modify the existing decisions as to determine that a mining company under the Act of 1909 should not be required to pay taxes upon that portion of it's proceeds which represent destruction of capital assets.

We, therefore, respectfully urge that in answer to the first certified question it should be held that a mining company is entitled to deduct from it's gross income some amount on account of depletion or exhaustion of ore bodies.

That, in answer to the second question, it

should be held that such corporation is entitled to a deduction to the extent of the cost value of the ore in the ground before it was mined assertained in strict compliance with the rules and regulations of the Treasury Department.

That the answer to the third question should be in the affirmative.

Respectfully submitted,

HENRY M. HOYT, Attorney
for
The Goldfield Consolidated Mines Company.

Hoyt, Gibbons, French & Springmeyer
of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE GOLDFIELD CONSOLIDATED MINES Company,
v.
JOSEPH J. SCOTT, AS COLLECTOR OF United States Internal Revenue, Fourth California District.

No. 334.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, appearing on behalf of the Collector of Internal Revenue, and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

This is a suit to recover taxes alleged to have been erroneously assessed and collected within the meaning of the Corporation Excise Tax Act of August 5, 1909, 36 Stat. 11, 112. A general demurrer to the complaint was sustained by the District Court and a writ of error sued out from the Circuit Court of Appeals for the Ninth Circuit which has certified to this court the following questions.

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I.

Under the provisions of paragraph 38 of the Act of Congress entitled: "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909 (36 Stat. L., p. 11, at p. 112), is a mining corporation, for the purpose of determining its net income for the basis of taxation, entitled to deduct from its gross income any amount whatever on account of depletion or exhaustion of ore bodies caused by its operations for the year for which the tax is assessed?

II.

Is such a corporation under said act entitled in the ascertainment of its net income to a deduction against gross proceeds from the mining and treatment of ores to the extent of the cost value of the ore in the ground before it was mined, ascertained in strict compliance with the rules and regulations of the Treasury Department of February 14, 1911 (Treas. Dec. 1675)?

III.

Where such a corporation claimed originally in its return of net income under said act a deduction for depreciation from exhaustion of ore for the year equal to the actual value of the ore in the ground before it was mined, and having been denied any deduction whatever for exhaustion of ore, and having been assessed accordingly and having paid the

resulting tax, made application pursuant to sections 3220 and 3226, Revised Statutes, for refund, during the pendency of which application said corporation was granted leave to amend and did amend its return of net income in strict accordance with the rules and regulations promulgated February 14, 1911, sections 80 to 89, Treasury Decision 1675, resulting in an amended return based upon cost as provided in said regulations and showing claimed deductions therefrom less than the corporation's net realizations for the year from the ore actually mined, is such corporation entitled to an allowance of deductions and refund of taxes accordingly?

IV.

In what, if any, way is the right to such claimed deductions affected by the fact that such corporation, in obedience to requirements imposed by the Commissioner of Internal Revenue at the time of filing its amended returns showing the cost value as of January 1, 1909, of the ores mined during the year, caused to be entered in its official books of account and printed in its annual report of that current year to all of its stockholders and to the public, a statement of the total amount of ore exhaustions, multiplied by the unit cost per ton on its mining properties for that and all previous years?

The case is of importance to the public revenues and the decision will determine the disposition of many similar cases now pending.

If the case be advanced, it is requested that it be set down for hearing on the same date with Nos. 421 and 422, which involve similar principles with reference to the construction of the "Income Tax Act" of October 3, 1913.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1917.